**APPENDIX A**

**STATE OF ILLINOIS**

**ILLINOIS COMMERCE COMMISSION**

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| **TracFone Wireless, Inc.** | : | |
| | : | |
| **Verified Petition for Declaratory Ruling** | : | |
| **finding that Section 17 of the** | : | |
| **Wireless Emergency Telephone Safety Act** | : | **07-0023** |
| **50, ILCS 751/17, does not apply to require** | : | |
| **TracFone Wireless, Inc. to remit** | : | |
| **monthly wireless carrier surcharges** | : | |
| **to the Illinois Commerce Commission** | : | |

## ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER

## I. PROCEDURAL HISTORY

On January 4, 2007, TracFone Wireless, Inc. ("TracFone"), filed a verified Petition pursuant to 83 Ill. Adm. Code 200.220, requesting a declaratory ruling that Section 17 of the Wireless Emergency Telephone Safety Act ("WETSA")[1], as originally enacted, was inapplicable to TracFone's prepaid wireless telephone service from December 22, 1999 through December 31, 2003. During those four years, TracFone remitted approximately $1.17 million to the State of Illinois ~~in order to comply with~~under Section 17 of WETSA, which establishes a funding mechanism associated with emergency wireless telephone service (E911). ~~Although TracFone does not seek to recoup those payments in this proceeding, the Commission assumes that TracFone would use the requested declaratory ruling in a subsequent effort, perhaps in another forum, to recover money paid.~~

On February 9, 2007, Commission Staff filed an Answer to the Petition, denying TracFone's contention that Section 17 did not require remittances to the State of Illinois during the relevant time period. Staff additionally posed four affirmative defenses that would either preclude the Commission from issuing a declaratory ruling or result in a declaratory ruling adverse to TracFone.

On March 12, 2007, in accordance with a schedule proposed by the parties and approved by the Administrative Law Judge ("ALJ"), TracFone filed a Statement of Certain Undisputed Facts on Cross-Motions for Summary Judgment ("Fact Statement"). This document contained factual assertions accepted by both parties as true for the purpose of summary judgment motions to be filed at a later time. On March 16, 2007, TracFone and Staff each filed a motion for summary judgment (respectively, "TracFone Motion" and "Staff Motion"). (TracFone's Motion concerns the substance of

[1] 50 ILCS 751/17.

its Petition, while Staff's Motion concerns the affirmative defenses in its Answer.) Each party filed a response to the other party's summary judgment motion on April 6, 2007 (respectively, "TracFone Response" and "Staff Response"). The parties filed replies to each other's response on April 20, 2007 (respectively, "TracFone Reply" and "Staff Reply").

Pursuant to proper notice, the ALJ conducted hearings on January 30 and April 26, 2007 at the Commission's offices in Chicago, Illinois. TracFone and Staff appeared through legal counsel at both hearings. No other party intervened. The evidentiary record was closed and this matter was marked "heard and taken" on July 17, 2007.

An Administrative Law Judge's Proposed Order was served on the Parties on July 18, 2007.

## II. ANALYSIS AND CONCLUSIONS

### A. DECLARATORY RULING

Illinois Administrative agencies, including this Commission, are authorized to issue declaratory rulings by Section 5-150 of the Illinois Administrative Procedure Act ("APA")[2]:

> Each agency may in its discretion provide by rule for the filing and prompt disposition of petitions or requests for declaratory rulings as to the applicability to the person presenting the petition or request of any statutory provision enforced by the agency or of any rule of the agency.

To exercise the discretionary power offered by Section 5-150, the Commission has promulgated the required rules for filing and resolving declaratory ruling requests[3]. Staff does not assert that TracFone has failed to comply with the procedural requirements of Section 200.220, and the Commission perceives no procedural deficiencies.

Substantively, the instant Petition is grounded in the subsection 200.220(a)(1), which provides that:

> When requested by the affected person, the Commission may in its sole discretion issue a declaratory ruling with respect to: … the applicability of any statutory provision

[2] 5 ILCS 100/5-150(a).
[3] 83 Ill. Adm. Code 200.220.

> enforced by the Commission or of any Commission rule to the person(s) requesting a declaratory ruling[.]

Rule 200.220 describes how this Commission has elected to exercise the declaratory ruling power derived from APA Section 5-150. Importantly, we have chosen to wield that power "within [our] sole discretion." Thus, while the Commission need not render a requested declaratory ruling, irrespective of the merits of the substantive arguments presented by either the petitioner(s) or respondent(s), we have chosen to do so in this case in furtherance of our statutory role under WETSA.

## B. SUMMARY JUDGMENT

As noted above, the parties have chosen (at least initially) to abjure evidentiary hearings and resolve their dispute through cross-motions for summary judgment (augmented by the undisputed factual matter in the Fact Statement). This Commission recognizes summary judgment as an efficient dispute resolution mechanism when significant fact-finding is unnecessary[4]. Section 2-1005 of the Illinois Code of Civil Procedure[5] governs summary judgment in Illinois civil courts. While not specifically binding on cases before the Commission, this section offers a time-tested framework for summary decision-making. Section 2-1005 provides, in relevant part:

> The judgment sought shall be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

To the extent that the instant dispute can be resolved under applicable law without disagreement regarding material facts, the Commission will employ summary judgment within the Section 2-1005 framework. We note that this course is consistent with our declaratory ruling rules, under which "[t]he Commission may in its sole discretion dispose of a request for a declaratory ruling *solely on the basis of the written submissions filed before it*." 83 Ill. Adm. Code 200.220(i) (emphasis added).

## C. WETSA

[4] We have entered summary judgments in the following proceedings (among others): Rural Electric Convenience Cooperative, Co. and Soyland Power Cooperative, Inc. v. Central Illinois Public Service Co., Docket No. 01-0675, 2003 Ill. PUC Lexis 711 (September 4, 2003); Bloom Township High School, *et al.* v. Commonwealth Edison Co., Docket Nos. 95-0559, 95-0560, 95-0561 & 95-0563 (Consolidated), 1998 Ill. PUC Lexis 1150 (December 16, 1998); McDonough Power Cooperative v. Illinois Power Co., Docket No. 92-0102, 1994 Ill. PUC Lexis 217 (June 8, 1994); Scribcor, Inc. v. Commonwealth Edison Co., Docket No. 97-0345, 2000 Ill. PUC Lexis 287 (March 15, 2000).

[5] 735 ILCS 5/2-1005.

The essential purpose of WETSA is to establish[6] and fund[7] enhanced 911 emergency service for wireless telephone users. Funding responsibility is ultimately borne by subscribing customers[8], with wireless carriers having responsibility for levying and collecting surcharges[9]. As originally enacted, WETSA took effect on December 22, 1999. P.A. 91-660, eff. Dec. 22, 1999. Surcharges were mandated for subscribers by subsection (a) of Section 17, as follows:

> a) Except as provided in Section 45, each wireless carrier shall impose a monthly wireless carrier surcharge per CMRS connection that either has a telephone number within an area code assigned to Illinois by the North American Numbering Plan Administrator or has a billing address in this State. No wireless carrier shall impose the surcharge authorized by this Section upon any subscriber who is subject to the surcharge imposed by a unit of local government pursuant to Section 45. The wireless carrier that provides wireless service to the subscriber shall collect the surcharge set by the Wireless Enhanced 9-1-1 Board from the subscriber. The surcharge shall be stated as a separate item on the subscriber's monthly bill. The wireless carrier shall begin collecting the surcharge on bills issued within 90 days after the Wireless Enhanced 9-1-1 Board sets the monthly wireless surcharge. State and local taxes shall not apply to the wireless carrier surcharge.

50 ILCS 751/17(a).

In 2003, several amendments were made to WETSA. The following language was added to subsection 17(a), to become effective on January 1, 2004:

> In the case of *prepaid* wireless telephone service, this surcharge shall be remitted based upon the address associated with the point of purchase, the customer billing address, or the location associated with the MTN for each active *prepaid* wireless telephone that has a sufficient

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[6] "It is the intent of the General Assembly to: (1) establish and implement a cohesive emergency telephone number that will provide wireless telephone users with rapid direct access to public safety agencies by dialing the telephone number 9-1-1." 50 ILCS 751/5(1).

[7] "It is the intent of the General Assembly to: (3) grant authority to public safety agencies not already in possession of the authority to finance the cost of installing and operating wireless 9-1-1 systems and reimbursing wireless carriers for costs incurred to provide wireless E9-1-1 services." 50 ILCS 751/5(3).

[8] "It is the intent of the General Assembly to: (4) provide for a reasonable fee on wireless telephone service subscribers to accomplish these purposes." 50 ILCS 751/5(4).

[9] "[A] wireless carrier shall, within 45 days of collection, remit…to the State Treasurer the amount of the wireless carrier surcharge collected from each subscriber." 50 ILCS 751/17(b).

> positive balance as of the last day of each month, if that information is available.

*Id*. (emphasis added).

Prior to the 2003 amendments, *prepaid* wireless telephone service was not expressly mentioned in WETSA. Along with the foregoing revision to Section 17, the General Assembly, in 2003, also approved several additions and alterations for the Definitions section of WETSA[10] (discussed below), directly addressing prepaid service.

WETSA was amended again on June 30, 2004. Until that date, the General Assembly had assigned management of WETSA funding to the Illinois Department of Central Management Services ("DCMS"). "Beginning July 1, 2004, the rights, functions, powers and duties of [DCMS] as set forth in [WETSA] are transferred to and shall be exercised by the Illinois Commerce Commission." 50 ILCS 751/75. The power to administer and distribute WETSA funding remains with this Commission today.

## D. UNDISPUTED FACTS AND ISSUES PRESENTED

The parties agree that from the time WETSA took effect (December 22, 1999) until the day immediately before the effective date of the 2003 amendments (December 31, 2003), TracFone provided prepaid wireless telephone service in Illinois. Fact Statement at 1. They also agree that during that interval TracFone remitted $1,170,579 to the State of Illinois to comply with Section 17. *Id*., at 2. TracFone ~~now~~ asserts that it made such payments "out of its own funds, not monies collected from customers" and that in late 2003 "TracFone discovered it had processed and made these payments in error~~," ."~~ ~~because Section 17 was inapplicable to TracFone during the pertinent time period.~~ TracFone ~~Summary Judgment~~ Motion at 6. In the present case, TracFone asks the Commission to formally agree, through a declaratory ruling, with TracFone's view of the inapplicability of Section 17 prior to January 1, 2004.

TracFone's fundamental argument is that Section 17 placed no surcharge collection and remittance duties on prepaid service providers until WETSA was amended in 2003, with an effective date of January 1, 2004. In TracFone's view, the very fact that the 2003 amendments addressed prepaid services for the first time proves that such services were not subject to WETSA surcharges prior to the amendments. TracFone cites specific legislative history to support this position.

Staff responds that WETSA applied to all wireless telephone providers - prepaid or otherwise - when originally enacted in 1999, and that the 2003 amendments merely added specific surcharge collection and remittance mechanisms for prepaid providers. Thus, by Staff's reasoning, TracFone was obliged to make Section 17 remittances

[10] 50 ILCS 751/10.

during the relevant 1999-2003 period, but was not directed by the statute to employ any particular surcharge collection mechanism. The 2003 Amendments, according to Staff, simply supplemented WETSA with specific collection mechanisms.

In addition to joining the foregoing dispute concerning the nature of TracFone's pre-2004 surcharge obligations, Staff presents affirmative defenses in two categories. The first category (alleging insufficient statutory authority and contravention of a statute of limitations) would bar the Commission from issuing a declaratory ruling. The second category (alleging unjust enrichment and voluntary "tax" payment) would preclude us from entering TracFone's requested ruling even if we agreed that WETSA did not require prepaid providers to remit surcharges before the 2003 amendments took effect. Logically, and with due regard to administrative efficiency, we will consider Staff's initial category of affirmative defenses first, since a ruling adverse to TracFone would cause us to terminate this docket without ruling on the substance of TracFone's ~~petition~~ Petition or Staff's second group of affirmative defenses.

### E. AFFIRMATIVE DEFENSE – IMPROPER MATTER FOR DECLARATORY RULING

Staff asserts that the Commission cannot grant a declaratory ruling in this case "as a matter of law." Staff Motion at 6. Staff presents two bases for its argument, one grounded in the Illinois Declaratory Relief Act[11], from which Staff urges us to take "guidance" concerning declaratory rulings, and one grounded in the nature of our authority under APA Section 5-150, as expressed through Section 200.220 of our rules. In our judgment, the latter basis deserves our first consideration, because it, not the Illinois Declaratory Relief Act (which applies to the judicial branch), specifically addresses the extent of our authority regarding declaratory rulings. Guidance from the Illinois Declaratory Relief Act, and the precedents that apply it, will be unnecessary if our own enabling provisions preclude declaratory ruling here. Moreover, it is not clear how a statute that offers only guidance can bar declaratory ruling "as a matter of law."

Staff's challenge to our power to grant declaratory relief under APA Section 5-150 and Section 200.220 has, itself, two parts. Staff's first argument is that this Commission is limited to whatever declaratory power DCMS had before its WETSA duties were transferred to us. According to Staff, DCMS had no such power. Staff Motion at 12. Therefore, we received none from DCMS and cannot issue the declaration TracFone requests. As Staff explains it, the rationale for this argument is derived from the WETSA 2004 amendment (Section 75) that ended DCMS oversight of wireless carrier funding:

> Under Section 75 of WETSA, the "rights, functions, powers, and duties of [DCMS] as set forth in this Act are transferred

[11] 735 ILCS 5/2-701.

> to and shall be exercised by the … Commission." 50 ILCS 751/75(a). This transfer specifically "[did] not affect any person's rights, obligations, or duties … arising out of those transferred rights, powers, duties, and functions." 50 ILCS 751/75(c). Thus, Petitioner's right to a declaratory ruling regarding the application of WETSA prior to January 1, 2004, is whatever it might have been on June 30, 2004. Accordingly, to the extent that the Petitioner did not have a right to a declaratory ruling on June 30, 2004 – and, as seen above, it clearly had no such right under Section 5-150 – it does not have such a right today.

Staff Motion at 12.

TracFone responds by stressing that in Section 75, "the legislature transferred 'the rights, functions, powers and duties of the Department of Central Management Services *as set forth in this Act*' to the Commission." TracFone Response at 12 (emphasis in original). The Commission concurs with TracFone's view of the effect of Section 75. That amendatory provision simply divested DCMS of certain rights and duties *under WETSA* and assigned *those* to us. Section 75 did not alter any power we derive from other statutory sources - in this case, the declaratory power conferred by Section 1-150 of the APA. Staff's contention, taken to its logical extreme, would render this Commission a mirror of DCMS with respect to rules of procedure and available remedies, effectively nullifying our pre-amendment regulatory matrix whenever a matter involved wireless carrier funding. We reject the claim that the Legislature intended that outcome. If the Legislature had intended to limit our power derived from Section 1-150 when it transferred certain WETSA responsibilities to us, it would have said so expressly[12].

In its other challenge to our declaratory relief power, Staff questions whether Section 17, as it existed prior to 2004, constitutes a statute "enforced by" the Commission within the meaning of Section 200.220(a)(1). Staff argues that Section 17 is "a statute that the Commission *never enforced in its contested [i.e., pre-2004] form*." Staff Reply at 4 (emphasis in original). Staff's argument requires some explanation. As we already have discussed, WETSA was amended in 2003, with an effective date of January 1, 2004, to address prepaid wireless service for the first time. P.A. 93-0507, § 70, eff. Jan. 1, 2004. TracFone seeks a declaration that the wireless surcharge did not apply to prepaid wireless service providers prior to the effective date of the 2003 amendments. Meanwhile, as also discussed above, the General Assembly in 2004

[12] Indeed, even regarding the *substantive* provisions of WETSA, the Legislature affirmed our authority to alter DCMS policies. *E.g.*, "[t]he rules and standards of [DCMS] that are in effect on June 30, 2004 and that pertain to the rights, powers, duties and functions transferred to the [Commission] under this amendatory act…shall become the rules and standards of the [Commission] on July 1, 2004, and shall continue in effect *until amended or repealed by the [Commission]*." 50 ILCS 751/75(b) (emphasis added).

transferred DCMS' "rights, functions, powers and duties" over administration of the WETSA surcharge to this Commission effective July 1, 2004. P.A. 93-0839, § 10-160, eff. July 1, 2004. Thus, Staff argues that, because the statutory provisions at issue in this proceeding - i.e., WETSA's pre-2004 language - were amended before the General Assembly transferred oversight of the wireless surcharge to the Commission, the Commission cannot interpret the relevant statutory language.

In short, the salient question framed is whether the legislature's determination to transfer to the Commission the obligations previously held by DCMS under WETSA's statutory provisions (principally, Section 17 and WETSA's definitions) at the same time created an implied limitation on an aggrieved wireless carrier's right to petition the Commission for declaratory relief relating to the statute's enforcement? The Commission concludes that the answer to the foregoing question is no.

Nowhere in Staff's filings—or more importantly in the statute—is there any support for the position that the Legislature had intended to limit wireless carriers' rights in any such manner when it transferred the responsibility for enforcing WETSA to the Commission. If the legislature had, it would have said so expressly. Indeed, P.A. 93-0507 amended but expressly *did not repeal* the statute, extending WETSA's expiration date until April 1, 2008. P.A. 93-0507, § 70, eff. Jan. 1, 2004 (codified at 50 ILCS 751/1 *et seq.*). Moreover, the Commission acknowledges TracFone's cogent warning that if it cannot pursue the instant Petition, "then no wireless carrier would have the ability to obtain relief for the alleged improper enforcement of WETSA prior to July 1, 2004, which was not and could not have been the legislature's intent in amending [WETSA]." TracFone Response at 7. In short, Staff has offered no authority and the Commission is unaware of any support for Staff's position that the legislature intended to time limit the rights of wireless carriers to seek administrative relief under WETSA, based solely upon the 2003 and/or 2004 amendments to the statute, and the Commission declines to imply any such limitation.

~~In its other challenge to our declaratory relief power, Staff questions whether Section 17, as it existed prior to 2004, constitutes a statute "enforced by" the Commission within the meaning of Section 200.220(a)(1). Staff correctly emphasizes that Section 17 is "a statute that the Commission *never enforced in its contested [i.e., pre-2004] form*." Staff Reply at 4 (emphasis in original). As we have already discussed, the original text of WETSA, which TracFone believes did not require remittance of surcharges, ceased to be effective on January 1, 2004. DCMS's "rights, powers duties and functions" concerning WETSA were not transferred to this Commission by the General Assembly until July 1 of that year. Therefore, this salient question is framed: are statutory provisions (principally, Section 17 and WETSA's definitions) "enforced by" us, so as to confer authority to enter a declaratory ruling under Section 5-150 of the Illinois APA (as implemented through Section 200.220(a)(1) of our rules), solely because we now administer those provisions, even though those provisions were outside our purview and contained different terms at all times relevant to this dispute?~~

The Commission concludes that the answer to the foregoing question is no. During the time TracFone was remitting the disputed surcharges, the General Assembly had assigned the collection of WETSA surcharges to DCMS. In our view, the declaratory authority provided by Section 1-150 does not include the power to issue retroactive rulings about the application of a law "enforced by" another agency during the relevant time period (particularly when that law was modified and, for that reason, never enforced by us). We reject the idea that our authority to issue declaratory rulings extends to second-guessing the prior performance of sister agencies.

Such second-guessing would be notably unjustified in this specific instance, because *the Commission was enforcing other WETSA provisions at the time DCMS was enforcing Section 17*. Indeed, during the pre-2004 time period pertinent to this proceeding, WETSA implementation was divided among several administrative bodies. We were one of them, but enforcement of Section 17 in particular was not given to us. Thus, by entering a declaratory ruling now about pre-amendment Section 17, we would be retroactively enforcing a provision explicitly assigned at the time to DCMS – and knowingly *not* assigned to us.

The overall pre-amendment structure of WETSA makes this clear. This Commission was charged with setting standards for directing wireless 911 calls and with registering and approving 911 emergency service providers[13]. The Department of State Police was directed to participate in some of those activities[14]. The actual setting of the wireless carrier surcharge to be collected under Section 17 was delegated to the Wireless Enhanced 911 Board ("Board"), an entity created by WETSA, with members appointed by the Governor with the consent of the state Senate[15]. The management and distribution of the funds collected pursuant to the Board-determined surcharge was assigned to DCMS[16]. Since WETSA duties were apportioned among several bodies, the General Assembly plainly intended for each involved agency to handle certain tasks and not others.

Consequently, if we asserted enforcement power over pre-amendment Section 17, we would not only be claiming retroactive authority to construe and apply provisions enforced by another agency at the relevant time. We would also be derogating the specific Legislative allocation of WETSA enforcement power that prevailed before January 2004. The general declaratory authority we derive from Section 5-150 does not

[13] 50 ILCS 751/15(a) & (b).
[14] *Id.*
[15] 50 ILCS 751/15(c).
[16] 50 ILCS 751/25; 83 Ill. Adm. Code 1000.310. (*See*, generally, 83 Ill. Adm. Code Part 1000.) The amounts collected by DCMS were remitted to the State Treasurer for deposit into the Wireless Service Emergency Fund, 50 ILCS 751/20, and the Wireless Carrier Reimbursement Fund. 50 ILCS 751/30. DCMS then determined how, and to whom, money in those two funds would be distributed. 83 ILCS 751/25 & 35.

override the considered matrix of WETSA specifically crafted by the Legislature before 2004. Just as we hold, above, that the Section 75 transfer of certain WETSA duties to the Commission does not abrogate our general declaratory authority under Section 5-150, so, too, do we hold here that the transfer does not expand our Section 5-150 authority to laws enforced by other agencies - especially when the Legislature knowingly gave us other duties within the same act at the pertinent time.

A related question arises. Did the DCMS "rights, powers duties and functions" transferred to us by WETSA Section 75 actually include enforcement of the pre-amendment Section 17? In July 2004, this Commission received only those powers then exercised by DCMS. In June 2004, DCMS was implementing a version of WETSA that expressly requires prepaid wireless carriers to collect and remit surcharges. The version at issue in this proceeding no longer existed. Thus, when DCMS obeyed the statutory command to transfer its responsibilities to this Commission in July 2004, it was not then "enforcing" the statute that TracFone asks us to construe now (that is, the statute without express provisions for prepaid providers). Therefore, the power TracFone wants us to exercise through declaratory ruling is not really transferred enforcement power associated with an effective statute, but, rather, whatever power DCMS may have had to revise its purportedly erroneous enforcement of the pre-amendment statute.

As we have noted, Staff stresses that DCMS had no declaratory ruling authority to transfer to us. And as we have held, our own Section 5-150 declaratory power does not extend to a statute that was never within our enforcement purview, and that was expressly assigned to a different agency when other duties were assigned to us within the same act. Accordingly, we conclude that we have no power, whether directly from Section 5-150 or by transfer from DCMS, to issue the declaratory ruling TracFone seeks. Whether we have any other authority to address matters arising under the pre-amended Section 17 is another question, for which the Commission offers no answer. TracFone has only sought to invoke our declaratory ruling authority, and we conclude that we have none to exercise in this instance. Consequently, the Staff Motion should be granted.

The Commission acknowledges TracFone's warning that if it cannot pursue the instant Petition, "then no wireless carrier would have the ability to obtain relief for the alleged improper enforcement of WETSA prior to July 1, 2004, which was not and could not have been the legislature's intent in amending [WETSA]." TracFone Response at 7. While we agree that our conclusions here do foreclose declaratory relief from us, that does not necessarily mean TracFone has (or had[17]) no remedy with respect to pre-2004 WETSA enforcement. As the Commission understands it, TracFone's ultimate objective

[17] We intend no comment on whether any claim in any other forum, or any non-declaratory claim before this Commission, would be time barred today. Our sole intention here is to describe a monetary remedy that would be available to a wireless carrier in the event of a timely-filed claim.

~~- the recovery of surcharges paid before 2004 - can be appropriately pursued in the Illinois Court of Claims[18].~~

> ~~The Court of Claims exercises exclusive jurisdiction to hear "all claims against the State founded upon any law of the State of Illinois or upon any regulation adopted thereunder by an executive or administrative officer of agency." 705 ILCS 505/8(a)…A Claim will be found to be against the State where a judgment for the plaintiff could subject the State to liability or control the actions of the State. [Citation omitted.] Where a party seeks a monetary judgment against an agency payable out of state funds, the proper forum is the Court of Claims. [Citation omitted.]~~

~~James v. Mims, 316 Ill. App. 3d 1179, 1181, 738 N.E. 2d 213, 215, 2000 Ill. App. Lexis 792 (1st Dist. 2000). The record here suggests, but does not definitively establish, that TracFone has initiated action in the Court of Claims[19].~~

~~During the time when DCMS was still managing the surcharge collection and distribution process, TracFone also had the option of filing suit in the Circuit Courts to challenge DCMS's implementation of WETSA. In Illinois RSA No. 3, Inc., et al. v. DCMS, 348 Ill. App. 3d 72, 809 N.E. 2d 137, 2004 Ill. App. Lexis 470 (1st Dist. 2004), plaintiff wireless carriers successfully overturned DCMS's construction of 50 ILCS 751/35. While Illinois RSA No. 3 did not include a request for monetary recovery[20], it did involve a question of statutory application, as does TracFone's Petition here. Additionally, DCMS itself had a codified a protest procedure with respect to WETSA. "A Provider or Carrier aggrieved in connection with any action taken by DCMS under this Part may file a protest." 83 Ill. Adm. Code 1000.610. Our record does not show that TracFone filed such a protest[21].~~

~~Finally, the Commission emphasizes here what we noted before. In Section 200.220, we reserved full discretion concerning declaratory rulings. In view of the prevailing circumstances of the instant proceeding, even if we had the power to issue the requested declaration, we would employ our discretion to decline doing so.~~

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~~[18] Again, we intend no comment on any statute of limitations applicable to the Court of Claims.~~

~~[19] TracFone Response, Exh. 4, final un-numbered page ("In Staff's view, any claims of TracFone are appropriately resolved at the Court of Claims. We understand TracFone to be pursuing that course of action.")~~

~~[20] The Commission does not know whether the wireless carriers in Illinois RSA No. 3 incurred monetary losses as a result of DCMS's actions or, if they did, whether the carriers subsequently sought reimbursement in the Court of Claims.~~

[21] TracFone did send correspondence to DCMS, dated May 17, 2004, after WETSA was amended to specifically impose surcharges on the customers of prepaid carriers. TracFone Response, Exh. 1. The Commission cannot determine whether that correspondence constituted a protest under DCMS rules. The correspondence does not, however, request reimbursement of surcharge remittances.

~~TracFone had – and may still have – the mechanisms discussed above for pressing its interpretation of WETSA and for recovering remitted surcharges. Even with declaratory authority, the Commission would be disinclined to judge the performance of a co-equal administrative agency regarding statutory provisions we have never had to implement, particularly when TracFone did not use available opportunities to formally cause that agency to defend its actions and policies.~~

### F. OTHER AFFIRMATIVE DEFENSES ~~AND TRACFONE'S MOTION~~

The Commission does not find merit in the remainder of Staff's affirmative defenses. First, Staff asserts that TracFone's Petition is time barred under Section 13-205 of the Code of Civil Procedure, 735 ILCS 5/13-205. In particular, Staff asserts that the five-year limitations period under Section 13-205 bars any claim arising prior to January 5, 2002. Much like its reliance on the Declaratory Relief Act, Staff, provides no authority for its position that Section 13-205 would limit TracFone's opportunity to be heard before the Commission. We find that it does not. Second, Staff asserts that the Commission's grant of the declaratory relief sought by TracFone would result in TracFone's unjust enrichment. It is unclear, however, how the General Assembly's determination to exclude prepaid wireless telephone service from WETSA prior to 2004 - assuming the Commission were to agree with TracFone's statutory reading - would result in TracFone's "unjust enrichment." In any event, unjust enrichment is a judicial defense that does not apply here. Finally, Staff argues that TracFone cannot obtain the declaratory relief sought, because TracFone, according to Staff, remitted the underlying payments to the State of Illinois "voluntarily." The undisputed facts, however, establish that TracFone did *not* voluntarily make the payments to the State of Illinois that are pertinent to TracFone's Petition. As stated in its verified motion, TracFone processed and made those payments in error. TracFone Motion at 5-6. The Commission further notes that this final defense was not identified by Staff for consideration on summary judgment at the January 30, 2007 status hearing or in the parties' agreed Statement of Certain Undisputed Facts on Cross-Motions for Summary Judgment and merits no further discussion.

~~Given our conclusions in the preceding section of this Order, the Commission will not render decisions regarding Staff's other affirmative defenses. Thus, although Staff maintains that Section 13-205 of the Illinois Code of Civil Procedure, 735 ILCS 5/13-205, establishes the applicable statute of limitations for TracFone's request for a declaratory ruling, and although Staff further asserts that some or all of TracFone's claim is time-barred by that statute, we make no ruling regarding Staff's arguments. Our operative holding in this Order is that we lack authority to issue the requested declaration. We will not determine whether a claim we have no power to entertain was timely filed.~~

~~Since we are granting Staff's Motion, TracFone's Motion must be denied. Denial is based solely on the grounds discussed above. We have not addressed the~~

~~substantive merits of TracFone's contention that it was not, as a prepaid carrier, obliged under WETSA to collect and remit surcharges before 2004.~~

## G. TRACFONE'S MOTION

Having disposed of each of Staff's affirmative defenses, the Commission turns to the substance of TracFone's request for declaratory relief. As discussed above, TracFone asks the Commission for a ruling that WETSA did not apply to require TracFone to collect and remit monthly wireless surcharges to the State of Illinois from its enactment until January 1, 2004. TracFone's position is based on the actual statutory language which TracFone correctly points out placed no surcharge collection and remittance duties on prepaid service providers until WETSA was amended effective January 1, 2004. TracFone cites specific legislative history to support this position. Staff responds that, while WETSA did not expressly refer to prepaid services when enacted in 1999, the statute reasonably could be construed to have applied to all wireless carriers prior to 2004. Staff argues that the 2003 amendments merely added specific surcharge collection and remittance mechanisms for prepaid providers. Thus, Staff's position is that the 2003 amendments merely clarified WETSA but were not a change in the law.

As a preliminary matter, the Commission notes that Staff does not dispute the facts supporting TracFone's Motion and concurs that the issue presented is purely one of statutory construction. Cases turning on statutory construction are appropriate for summary judgment. *Allegis Realty Investors v. Novak*, 223 Ill. 2d 318, 330, 860 N.E.2d 246, 252 (2006).

The rules the Commission should apply in interpreting WETSA are well established:

> [T]he primary rule, to which all other rules are subordinate, is to ascertain and give effect to the true intent and meaning of the legislature. Legislative intent is best evidenced by the language used by the legislature, and where an enactment is clear and unambiguous a court is not at liberty to depart from the plain language and meaning of the statute by reading into it exceptions, limitations or conditions that the legislature did not express. Further, in ascertaining the meaning of a statute, the statute should be read as a whole with all relevant parts considered. A statute should be construed so that no word or phrase is rendered superfluous or meaningless.

*Kraft, Inc. v. Edgar*, 138 Ill. 2d 178, 189, 561 N.E.2d 656, 661 (1990) (citations omitted).

TracFone's proposed statutory construction arises from the actual language of WETSA which prior to January 1, 2004 contained no reference whatsoever to prepaid

wireless telephone service. *See* P.A. 99-660, eff. Dec. 22, 1999. Staff concedes that WETSA, as originally enacted, included no reference to prepaid wireless telephone service. Nonetheless, Staff asserts that WETSA "unambiguously" applied to require TracFone to remit wireless carrier surcharges during the relevant time period. To reach this conclusion, Staff argues that "one very reasonable interpretation of Section 17 as originally enacted is that it required the surcharge *to be rendered explicit*, which any carrier might readily do, regardless of the manner by which it collects the payments from its customers." Staff Response at 7 (emphasis provided). But WETSA actually says something different. However "reasonable" Staff's proposed reading, the Commission has no authority to invent requirements making the wireless surcharge applicable to prepaid service providers, like TracFone, that did not exist in the plain language of the original Act. *Kraft,* 138 Ill. 2d at 189, 561 N.E.2d at 661.

TracFone's position that WETSA did not apply to prepaid services when enacted also is consistent with the Act's prescribed collection procedures for the wireless surcharge prior to 2004. These procedures required the surcharge to appear as a separate line item on each customer's monthly bill. It is undisputed that these procedures could not apply to prepaid wireless telephone service, because prepaid wireless telephone service by definition does not include monthly billing. Thus, it is TracFone's position that the term "wireless carrier" under WETSA should not be construed to include prepaid wireless telephone service prior to 2004. In this respect, TracFone asks the Commission to read WETSA's definition of "wireless carrier" and the WETSA's original provisions for collecting and remitting the surcharge in harmony. *Compare* P.A. 91-660, §§ 5 and 17; *see People v. Trainor*, 196 Ill. 2d 318, 332, 752 N.E.2d 1055, 1063 (2001) (citation omitted) (statutory provisions should be read to be harmonious and consistent).

Staff acknowledges that the General Assembly for the first time addressed "prepaid wireless telephone service" through P.A. 93-507, which also added specific provisions prescribing how prepaid wireless service providers should collect and remit the 9-1-1 surcharge. Nonetheless, Staff argues that the 2003 amendments did not make the wireless surcharge applicable to prepaid providers because, according to Staff, prepaid providers already were included implicitly within the Act's definition of "wireless carrier." Thus, Staff argues that "P.A. 93-507 [was] clearly intended to remove a certain ambiguity from WETSA by articulating a method by which prepaid wireless carriers could bill the surcharge to end users." Staff Response at 10-11.

But there is nothing unclear in the Act's original requirements for collection of the wireless surcharge, which stated.

> The wireless carrier that provides wireless service to the subscriber shall collect the surcharge set by the Wireless Enhanced 9-1-1- Board from the subscriber…*The surcharge shall be stated as a separate item on the subscriber's monthly bill*. The wireless carrier shall begin collecting the

surcharge on bills issued within 90 days after the Wireless Enhanced 9-1-1 Board sets the monthly wireless surcharge.

P.A. 91-660, § 17, eff. Dec. 22, 1999 (emphasis provided). Thus, as originally enacted, WETSA provided unambiguous requirements for collection of the 9-1-1 surcharge. The Commission has no reason to presume that the legislature did not mean what it said when it first passed WETSA in 1999.

Staff also concedes that amendment of an unambiguous statute is evidence of a change in the law. Staff Response at 9. *See People v. Jones*, 233 Ill. 2d 569, 2006 WL 3741971, at *8 (Dec. 21, 2006) (attached to TracFone's Motion as Ex. 4) ("[A]n amendment 'gives rise to the presumption that the new legislation was intended to effect a change in the law as it formerly existed.'"); *People v. Bowden*, 313 Ill. App. 3d 666, 671, 730 N.E.2d 138, 142 (4th Dist. 2000) (same). Similarly, Staff does not dispute that where the General Assembly amends a statute to add particular requirements - such as the definitions and procedures relating to "prepaid wireless telephone service" contained in P.A. 93-507 - the legislation effects a change in the law. Staff Motion at 10. *See Garibaldi v. Applebaum*, 194 Ill. 2d 438, 450-51, 742 N.E.2d 279, 285-86 (2000). Thus, the Commission finds that the original provisions of the Act addressing collection of the wireless surcharge were unambiguous and the 2003 amendments effected a change in the law and extended the application of the wireless surcharge to prepaid service.

Finally, TracFone's construction comports with the legislative history of the General Assembly's 2003 amendments. Staff argues that the Commission should give little or no weight to the 2003 amendments' legislative history (P.A. 93-507), because such information should not be used to construe the original Act (P.A. 91-660). The Commission already has found that WETSA is unambiguous. If the Commission believed WETSA were ambiguous, however, it could use legislative history to ascertain the legislature's intent in passing P.A. 93-507. *Wal-Mart Stores, Inc. v. Indus. Comm'n*, 324 Ill. App. 3d 961, 967, 755 N.E.2d 98, 103 (1st Dist. 2001). As shown in TracFone's Motion, the legislative history establishes that the General Assembly had two specific goals for these amendments: First, the legislature intended to extend the Act's sunset provision; second, the legislature intended to make the Act applicable "*to prepaid phones and things of that nature, something that wasn't there when we first did it*." House of Representatives Transcription Debate, pp. 174-75 (May 14, 2003) (emphasis provided). The transcript debate is contemporaneous legislative history pertaining to the passage and enactment of P.A. 93-507. Staff's argument misses the point.

## III. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

(1) TracFone is a wireless carrier as defined in Section 10 of the Wireless Emergency Telephone Safety Act, 50 ILCS 751/1 et seq., and has provided wireless communications services, as defined in Section 10, at all times pertinent to this proceeding;

(2) the Commission has jurisdiction over the parties hereto and the subject matter hereof;

(3) the recitals of fact set forth in the prefatory portion of this Order are supported by the evidence of record and are hereby adopted as findings of fact;

(4) the Commission's authority to issue a declaratory ruling, as derived from Section 5-150 of the Illinois Administrative Procedure Act and as codified as an administrative regulation of the Commission at 83 Ill. Adm. Code 200.220, is limited to the applicability of statutory provisions enforced by the Commission; Section 17 of the Wireless Emergency Telephone Safety Act, as originally enacted and as effective until December 31, 2003, was ~~not~~ and is ~~not~~ a statutory provision enforced by the Commission; therefore, the Commission ~~does not have~~has authority to issue a declaratory ruling with respect to the applicability of Section 17 to TracFone prior to January 1, 2004;

(5) under 83 Ill. Adm. Code 200.220, issuance of a declaratory ruling is at the sole discretion of the Commission, and even if the Commission has authority to issue a declaratory ruling with respect to the applicability of Section 17 to TracFone prior to January 1, 2004, it declines to do so, for reasons stated in the prefatory portion of this Order;

(6) Staff's Motion for Summary Judgment should be ~~granted~~denied, TracFone's Motion for Summary Judgment should be ~~denied~~granted~~, and TracFone's Verified Petition for a Declaratory Ruling should be dismissed with prejudice~~.

IT IS THEREFORE ORDERED that Staff's Motion for Summary Judgment is ~~granted~~denied, that TracFone's Motion for Summary Judgment is ~~denied~~granted~~, and that TracFone's Verified Petition for Declaratory Ruling is hereby dismissed with prejudice~~.

IT IS FURTHER ORDERED that any motions, petitions, objections, and other matters in this proceeding that remain outstanding are hereby denied.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Admin. Code § 200.880, this Order is final; it is not subject to the Administrative Review Law.

DATED

Chairman